

# After the Second Brexit Extension: What Now?

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Against the expectations of many voters, observers and commentators, Brexit still has not happened and the United Kingdom today remains an EU Member State. The political reason for this is simple: despite two somewhat farcical rounds of indicative votes, the UK's House of Commons still has not decided what kind of Brexit it is willing to support. All we know is that it is against the [Withdrawal Agreement](#) negotiated by the Prime Minister, against Brexit without a deal, against another referendum, and against most conceivable models of a future relationship ranging from a mere customs union to a close relationship such as [Common Market 2.0](#).

As the European Council has no appetite for a no deal Brexit either, it [decided](#) last week (with the consent of the UK) to extend the Brexit negotiating period for a second time until 31 October 2019. Legally, this move is unproblematic: There is nothing in Article 50 (3) TEU to suggest that an extension cannot be granted multiple times.

## New Brexit date(s)

There are two scenarios in which Brexit might occur at an earlier date than 31 October. First, as the preamble to the European Council's decision reiterates, Article 50 (3) TEU allows that the Withdrawal Agreement itself determines an earlier exit date should it be ratified before the end of October.

And second, the extension decision ceases to apply on 31 May already unless the UK has held European Parliament elections. The EU-side considered this condition to be necessary in order to avoid any doubt over the constitutional composition of the European Parliament after the elections in May. While there are [forceful voices](#) suggesting that a departing Member State did not have to hold such elections if they occurred during the negotiating period, the European Council preferred the safe option: The UK must hold elections if it wants to remain in the EU beyond 31 May.

This raises the question whether an extension decision under Article 50 (3) TEU can lawfully be subjected to such a condition. Article 50 TEU is silent on the matter and there is no authority on this. The practice of decisions taken under Article 288 TFEU suggests that conditional decisions are permissible and are regularly adopted, e.g. in the field of [state aid](#). Given the unanimous approval of the decision and its acceptance by the UK, there is therefore little room to doubt its legality.

## Sincere cooperation?

A more acute issue for the EU-27 is that the UK's request for a further extension came at a tricky point in time: It probably extends the UK's EU membership beyond the European Parliament elections in May and into the period when the new European Commission will be appointed. If the negotiating period is then further extended it might even mean that the UK and its MEPs partake in votes on the new seven year multiannual financial framework, which is of huge strategic importance for the future direction of the EU.

The preamble to the decision therefore says this:

The European Council takes note of the commitment by the United Kingdom to act in a constructive and responsible manner throughout the extension period in accordance with the duty of sincere cooperation, and expects the United Kingdom to fulfil this commitment and Treaty obligation in a manner that reflects its situation as a withdrawing Member State. To this effect, the United Kingdom shall facilitate the achievement of the Union's tasks and shall refrain from any measure which could jeopardise the attainment of the Union's objectives, in particular when participating in the decision-making processes of the Union.

This passage raises the question whether a withdrawing Member State is under a different kind of duty of sincere cooperation – laid down in Article 4 (3) TEU – compared with a continuing Member State. It suggests that this might be so when it highlights the UK's 'situation as a withdrawing Member State'. Might the UK therefore be legally obliged to refrain from influencing the composition of the next EU Commission or from voting against the proposed next EU budget? This view could be defensible in light of the overall object and purpose of Article 50 TEU: to facilitate an orderly – and thus non-chaotic and non-acrimonious – withdrawal from the EU.

There is a tension however with the ECJ's ruling in [Wightman](#) in which the Court held that as long as the negotiating period has not expired, the withdrawing Member State 'enjoys, subject to Article 50(4) TEU, all of the rights and remains bound by all of the obligations laid down in the Treaties.' That quote would suggest that even during the extended negotiating period a withdrawing Member State remains a Member State 'warts and all'.

This does not mean that it would not be politically opportune for the UK to refrain from meddling with the EU's future affairs; otherwise the hopes for a quick deal on the future relationship might evaporate rather quickly. But to construct a legal duty for a withdrawing Member State to abstain or not vote against the majority is hardly convincing. After all, nobody knows how long the UK will stay in.

## The next EU Commission

A connected issue concerns the UK's participation in choosing the next Commission President and the college of Commissioners. The new Commission is due to take

office on 1 November 2019. So long as the UK is not guaranteed to leave by 31 October, it would therefore make sense if the UK chose a candidate to take on the role of UK Commissioner.

But more importantly, the question arises whether the UK's participation in European Parliament elections might thwart – or indeed kill off – the *Spitzenkandidaten* process. Most observers expect the European People's Party to come out on top of the polls in May if the elections were held in the EU-27 only. Yet a UK participation in European Parliament elections might result in a strong showing for the Labour party, which could mean that the Socialist and Democrats surpass the EPP's number of seats in the European Parliament. If that happened, would the European Council feel obliged to propose a Socialist for the role of Commission President if that person's claim to the Commission presidency was based on UK Labour votes? One can doubt this, but if they refused, where would that leave the *Spitzenkandidaten* idea in the long term?

## Transition

An extension until 31 October – or potentially longer – raises one further issue: under the withdrawal agreement, the UK is due to first enter a transition period during which it would for most purposes remain bound by the EU acquis, but without being represented in the EU's institutions and decision-making processes. The transition period is strictly time-limited until 31 December 2020 with the possibility of a one-off extension for up to two years.

During the transition period, the EU and the UK are meant to negotiate their future relationship. Given the current difficulties with negotiating an acceptable withdrawal agreement, it would seem that even an extended transition period until 31 December 2022 might be too short to accomplish a much more complex treaty on a future relationship. Hence, if the 31 October exit date stands – or indeed if there is an even later exit date – the transition period should be extended as well.

## Next steps

In the run-up to last week's extension decision, the European Council insisted that for a long extension, the UK would need to present a credible plan as to how to proceed. It seems that the European Council accepted that the cross-party talks between the Government and Labour being held at the moment tick that box.

In truth the main problem for the UK remains: it has not made up its mind. It still needs to choose one of the same three basic options that it had before the extension was granted: exit with no deal; revoke the Article 50 notification and stay in the EU; or ratify the withdrawal agreement. The latter is – as the European Council reiterated – not open for renegotiation, whereas the accompanying political declaration is.

On the EU side, ratification requires a qualified majority decision of the Council. While this poses few logistical challenges, the equally required consent of the European Parliament does. The last session of the current European Parliament

is taking place this week. After that, the old European Parliament is not scheduled to reconvene. Hence if ratification were to take place before the new European Parliament convenes in early July, an extraordinary session would have to be scheduled. For the Parliament to be [quorate](#), one third of its members would have to show up on the day and a majority of those would have to be in favour of the withdrawal agreement. Both are likely to happen, but not guaranteed.

On the UK side things are trickier. According to the European Union (Withdrawal) Act 2018, the UK Government is only able to ratify the withdrawal agreement if a) the agreement and the political declaration have been approved by the House of Commons and b) the legislation implementing the withdrawal agreement has been passed. So far, the House of Commons has rejected the withdrawal agreement on three occasions; and the legislation implementing it has not even been introduced. And approval of the former does not imply approval of the latter. For instance, in 1972 the House of Commons voted to join the EEC with a [majority of 112 votes](#), but the European Communities Act 1972 which gave EU law domestic effect passed with a [mere 17 votes](#). The final requirement for ratification is that the procedure under the [Constitutional Reform and Governance Act 2010](#) is complied with, which requires that the agreement is laid before Parliament for 21 sitting days. This should not present a problem if Parliament has already decided to approve the agreement, but might delay ratification by a few weeks.

## Conclusion

If the cross-party talks between the UK government and Labour bear fruits, these procedures could at a push be completed before the end of May, which would allow the UK to leave without having to hold European elections.

If – as seems more likely – these talks result in nothing, the UK will need to elect MEPs in May. It is unlikely, however, that European Parliament elections will help to resolve the political impasse in Westminster. Hence, something else will have to move. Whether it is the resignation of the Prime Minister and her replacement with another conservative politician; or a general election; or indeed another referendum is currently unclear.

If another referendum were held, a further extension of the Article 50 period would probably become necessary. The same might be necessary in case of a general election, unless it happens before the summer. It is therefore safest not to bet on a 31 October Brexit.

